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PROVINCIAL POWER AT A PREMIUM

Aboriginal Rights, Alberta and the Constitution

by

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On 3 June 1983 during debate in the Alberta Legislative Assembly on a resolution to amend the Canadian Constitution Act in regards to aboriginal rights, the Minister of Federal and Intergovernmental Affairs (FIGA), Jim Horsman proudly stated: "Albertans can be justifiably proud of the role this government has played in the development of an amending formula. Our Premier, from his leardership in that development, has become, if I may use the term, an historic figure."[1]

That distinction may also be bestowed on Mr. Lougheed for his actions in the debates and discussions surrounding aboriginal rights in the Constitution. His role in representing Alberta during these discussions has led to a weakened wording of the section of the Constitution Act dealing with aboriginal rights. Premier Lougheed's argument, when acknowledging this function, has indicated that no undefined or unclear tights should be included in the Canadian Constitution. Thus he opposed the broad inclusion of aboriginal rights and opted for a less precise wording.

A provincial premier, supported by several of his counterparts, was able to override an agreement reached between the federal government and the native peoples' organizations due to the change in the amending formula and a subsequent increase in the power of the provinces. A question, that may at first seem obscure, is what do Mr. Lougheed's actions have to say about the nature of Canadian federalism? Perhaps more to the point is, has the amending formula given the provinces power to change the Constitution without granting the responsibility for the corresponding changes?

The goal of this study is a small one. I seek to provide an historical outline of the actions of the provincial government of Alberta during the period of constitutional reform from 1980 to 1983 and to outline that government's specific statements on aboriginal rights during that period. The next step will be to draw a picture of Alberta's actions and programs for native people in Alberta to see what type of responsibility has been taken for the native people of this province. Through a comparison of the two previous discussions it will be possible to outline some of the features of the policy of the Alberta government towards native people. From this it should be possible to see if Alberta sees its role as a defender of the unique nature of the native people or a more mandatory holder of these interests. When this question is answered it should be possible to note that Alberta has not been anxious to relinquish any of the traditional benefits of being a province (like lands and resource rights) and will not agree to the inclusion of any rights within the Constitution that will inhibit the use of its rights and privileges.

HISTORY OF ALBERTA'S ROLE IN THE CONSTITUTIONAL DEBATE ON ABORIGINAL RIGHTS

The federal government announced its constitutional proposals on 2 October 1980. The only section within that proposal dealing with aboriginal rights was the general provision for the guarantee of rights in section 24.

> 24. The guarantee in the Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada, in cluding any rights or freedoms that pertain to the native peoples of Canada.[2]

Native peeples' organizations across the country protested this lack of a statement and the federal government, bowing to the pressure from the native lobby, met with the three major native organizations and the federal opposition parites. The result of these discussions was the addition of section 34 on 30 January 1981. This section included the recognition of aboriginal and treaty rights and a definition of the aboriginal peoples of Canada.

Later that year the first ministers of Canada were presented with the Constitutional Act including section 34. 5 November 1981 marked the day the premiers sight the Constitutional Accord in Ottawa, but one important feature of the the proposed Constitution was missing — section 34 andthe subsequent recognition of aboriginal rights. Reasons for the exculsion of this section were that several of the premiers were uncertain as to the full implic ations of that section.

From that early November Accord, Alberta and Premier Lougheed began to play a decisive role in the constitutional process surrounding aboriginal rights. On 10 November, under questioning from opposition members in the Assembly the Premier stated that his government did not support the inclusion of section 34 in the Charter of Rights. He outlined in his arguments that section 34 was the work of the federal government and was not part of the initial proposal presented to the premiers. Further he argued that section 34 would lead to the inclusion of unclear and undefined rights, those rights which should first be defined during the conference to be called within one year of the signing of the Constitution. He said:

> As of last Thursday, the view of the provinces and of the government of Alberta is that such aboriginal and treaty rights should be identified and defined before a decision is made as to whether or not there should be anyinclusion in the Canada Act.... The importance of Paragraph 5 of the accord is to assure that with respect to these matters, over the course of the next year there be an identification and definition of such rights, then a presentation made by the aboriginal people to a first ministers' conference within the year.... Again it is clear that all existing rights of the aboriginal peoples of Canada are in fact included and will be included in the revised resolution.[3]

Two days later the Premier, in response to further questioning by Mr. Notley, the NDP member of the Assembly, clarified the government's position on Section 34.

> Mr. Notley: (T)he question I want to put to the Premier is... whether or not the government's position on Section 34 is related to the possibility that were Section 34 incorporated

> into the Charter of Rights it would prejudice the government's position in this province vis-a-vis Metis claims, both in terms of financial remuneration for royalties, which the federation of settlements, I believe, are due them, and whether or not that is any factor at all in the government's position.
>
> Mr. Lougheed:...The reason for the position of the government of Alberta last week in not agreeing to the inclusion of Section 34 had nothing to do with anything involving psychological advantages or disadvantages, or with the question of what claims might or might not be put forward.[4]

Mr. Lougheed further explained why the government felt section 34 would add rights for the aboriginal peoples.

> (I)f Section 25 protects existing rights, if Section 26 does not deny any rights that may be existing, the only purpose for having Section 34 would be to add rights.[5]

When Mr. Notley pressed the Premier to accept a proposal limiting the definition of the aboriginal rights to what is achieved within three years, Mr. Lougheed replied:

> There are two weaknesses to that position, obviously. The first one is that over the course of discussion and consideration it may be simply impossible to appropriately define what is intended by the rights provision stated in the earlier Canada Act, and there's the other one that the provinces upon reflection are not prepared to consider that rights are not prepared to consider that rights may be added within provincial jurisdiction, whenever rights are added, rights are often taken away.[6]

A week later Mr. Lougheed pointed out to the Leader of the Opposition, Mr. R. Speaker, that:

> under our Constitution, the basic responsibility for treaty

> Indians lies with the federal government. But with regard to the Metis people within this province, there's a clear responsibility on the government of Alberta.[7]

That same day representatives of the native peoples of Alberta marched to the Legislature to protest Alberta's insistence on the exclusion of Section 34. Mr. Lougheed spoke to them assuring that Alberta did support the inclusion of existing treaty rights in the Constitution and that he would welcome speedy discussions with them.

So speedy were the discussions that the next day the Premier sent a telex to the other first ministers calling for a change in the wording of section 34, to make it palatable to the provinces. This replacement section showed no change in Alberta's ideas on aboriginal rights. The proposed section 34 consisted of three sections: a) an affirmation of existing aboriginal and treaty rights, b) an inclusion of rights to be defined in the forthcoming first ministers' conference and c) a definition of aboriginal peoples to include Indian, Inuit, and Metis.[8]

The government of Alberta came away from this debate looking (at least at first glance) like a guardian of aboriginal rights. The Constitution resolution was amended to include Mr. Lougheed's proposal as section 35 instead of the previous section 34, and an affirmation of only <u>existing</u> treaty and aboriginal rights.

On 17 April 1982 the Constitution Act 1982 was signed and made official. Two days later the Minister of FIGA, Mr. Johnston, re-emphasized the high priority given aboriginal and treaty rights by the government of Alberta.

> Mr. Speaker, the protection of existing Indian and Metis rights is also clearly established in the constitution. Because we attached such a high priority to resolving this issue, the provinces and the federal government agreed to a first ministers' conference. In fact, that has been written directly into the constitution. From Alberta's point of view, we will adhere to that responsibility and obligation. We'll do our best to carry forward and join the native leaders in our province in forming and finding the resolution for their constitutional problems. I hope it can be achieved. It is one of our major priorities over the next year.[9]

Late in April 1982 Mr. Johnston informed the Assembly that the Indian groups would be accepted as part of the Alberta delegation to the first ministers' conference on aboriginal rights but would not be given equal status to the province since "We do not agree that the natives in Alberta have equal status with the province."[10]

The first ministers' conference on aboriginal rights was scheduled for 15 and 16 March 1983. The Premier of Alberta took a careful, go-slowly approach both in his opening speech and in his comments throughout the conference. He cautioned: "what we are trying to do is balance the rights of the people here (the native peoples) and the rights of other Canadians entrenched in the Constitution and law."[11] He would not agree to the removal of the word 'existing'from section 35 because he was still uncertain as to the consequences of those actions.

The federal government presented a proposal for the amendment to the constitution with regards to aboriginal rights, which would include the equal rights of native men and women, the inclusion of land claims settlements wunder treaty and aboriginal rights, the commitment to at least two more first ministers' conferences with the following four years and included on the agenda of these conferences a statement of principles which would include a recognition of some form of Indian self-government and an elaboration of the rights that are recognized and affirmed but not defined in the constitution.

Four of the premiers, Mr. Bennett of British Columbia; Mr. Devine of Saskatchewan; Mr. Peckford of Newfoundland; and Mr. Lougheed of Alberta disagreed wholeheartedly with the part of the resolution calling for the discussion of an elaboration of rights. Mr. Lougheed claimed that the inclusion of this section could appear to be a guarantee of the expansion of aboriginal rights. He explained his opposition to the statement of principles after the conference when he said:

> Many of ... the principles were unclear in their consequences and impact. And we were not prepared to sign any document that would lead to ... amendments to the constitution that were unclear to us.[12]

The final resolution put to all the parliaments in Canada did not include the criticized statement of principles. Once again the proposed resolution had been weakened by efforts fromthe Alberta delegation.

The Legislative Assembly of Alberta passed the resolution to amend

the Constitution Act on 3 June 1983. The debate was a series of compliments to the government for its fine performance during the entire discussion and for its strong role in struggle for aboriginal rights. The NDP members called for greater action by the government and contrasted the position of the Alberta and Manitoba governments. But the resolution was passed unanimously. Alberta has the fine honour to be only the second legislature to pass this resolution for the first amendment to the Canadian constitution. It is an amendment the Alberta government had a hand in formulating and is one that Alberta has been consistent on. There is no firm commitment to anything other than further meetings and there are no additional rights for the native peoples of Canada. No responsibilities have been placed on the provinces and yet as Alberta has shown through its performance, the provincial governments have a strong role in determining the final outcome of aboriginal rights in Canada.

PROGRAMS AND SERVICES TO NATIVE PEOPLE IN ALBERTA

Since the Lougheed government came to power in late 1971, actions and statements with regards to native people have reflected some consistancy Alberta has a Minister responsible for Native Affairs, a caucus committee on native affairs as vehicles for discussion on aboriginal policy. Actions are forced in land claim negotiations, court cases and financing for native programs. The province has assumed responsibility for the 60-65,000 Metis within Alberta and for the provision of social servies, housing, transportation and other provincial services (usually cost-shared with the federal government) to the reserves and Indian bands, but has continually stated that the constitutional responsibility for Indians lies with the federal government. This attitude came through clearly during the March 1983 First Ministers'Conference on Aboriginal Rights. One analyst with the Toronto Globe and Mail reported the attitude as follows:

> Several provinces, including Nova Scotia, B.C., Alberta and Saskatchewan, emphasized that the constitutional responsibility for Indian and Inuit resides with the federal Parliament. And while they would not relinquish any influence they might have over this through the amending process (in that many land claims settlements involve provincially-owned land and resources), they promised to press Ottawa to carry out its responsibilities more fully.[13]

The first public statement assumed some provincial responsibility for Alberta's native people was made formally in the throne speech for 1975. But two years prior to that, one sentence had been given to the commencement of the Metis Housing Program and its success. In a section entitled "Our Native People" the government promised in 1975 to provide funding to the Alberta Native Development Corporation and grants-in-aid

for self-help and development programs. From 1976 to 1983 the section on Native Affairs within the throne speech mentioned a few major areas: funding for social service upgrading for natives; provision of housing programs especially in isolated northern communities; employment of natives in the public service and funding for programs to encourage the employment of natives in the private sector. The focus shifted slightly in 1981-83 towards funding for native business ventures. Two corporations have been established and funded by the government, the Business Assistance for Native Albertans Corporation (BANAC) and the Native Venture Capital Corporation. Other less prominent ventures have been: the extension of services to native farmers (1976); the Indian treaty commemorative program (1977); the urban native referral program (1979-80); the extension of the education opportunities fund to assist urban natives to become aware of their historical and cultural heritage (1981); and funding to the Metis organizations for their research for the constitutional conference on aboriginal rights (1982).

What is perhaps more curious in this wide list of initiatives is that which is missing. No comment is made of the government's policy towards native people. One reference is made to the direction of programs in 1977 when the government called for programs that would stress initiative at the local level and would allow a certain autonomy for the native peoples involved.[14] But there is no indication of the responsibility the government takes for the Metis as compared to the status Indians or whether programs are merely funded by the government rather than initiated by the government.

When the Progressive Conservatives came to power in 1971, Cabinet or Executive Council was expanded and many new ministries were established. One of these new portfolios was that of the Minister responsible for Native Affairs. Although this is not a full ministerial position, the person given this portfolio is responsible for the Native Affairs Secretariat (which was formed in 1975). The Secretariat has two functions: a) providing policy advice to other departments regarding natives and b) to provide assistance to native organizations through field services. The estimates for this area as indicated on Table 1 on page 15 show a doubling of grants to native groups since the Secretariat's inception.

The Alberta government has taken the initiative to organize the Native Affairs Secretariat but has not given power to this structure. The Secretariat has no specific program responsibilities and is under the direction of Executive Council. Funding has not been limited to Metis groups which indicates that the Alberta government acknowledges some responsibility for Indians. Officials from the department, in reponse to questioning, emphasized the co-ordination role of this department and the legislative responsibility of the province for only the Metis.

One other arena for discussion on native issues is the Caucus committee on Native Affairs. This committee is composed of government MLAs who have special interest and concerns in native affairs. Since it is a caucus committee, the discussions and resulting documents are not public information.

Land claims discussions are another opportunity for the Alberta government to assert and assess its policy towards natives. Fifteen specific claims have been raised in Alberta. Of these three have been considered of merit by the federal Office of Native Claims and will be discussed further in this forum. Another six have been rejected by the federal government and are presently in the courts. The major concerns of the bands or tribes presenting the claims have been land and resource rights. One major claim in Alberta has been made by the Lubicon Lake Indian Band. They began legal action:

> to gain recognition of its claim to mineral rights on surrendered land. Last week the band, which claims Alberta and Ottawa reneged on an agreement to establish reserve land in 1940, won the right ro proceed with an injunction to halt oil and gas activity in a 900-square-mile area. The case is expected to eventually go to the Supreme Court of Canada.[15]

Other claims like the Blood Indian Band and the Indian Association of Alberta's claim on behalf of the Piegan band, if resolved in favour of the native people, would result in a loss of land and possibly the resource rights accompanying that land. The Attorney-General in commenting on the Lubicon Lake claim said these lawsuits take time and will not be resolved speedily. For those claims in court, Mr. Crawford had little to say except "the lawsuit is indeed under way."[16] -- a statement reflecting a laissez-faire attitude towards native claims and a desire to keep the process going as long as possible. A more cynical person might add that the province seems to be doing as little as possible to facilitate native claims since it has so much to lose from a resolution of these claims.

Since 1977 the government of Alberta has also been involved in a $30 million lawsuit with the Federation of Metis Settlements to establish who receives the resource revenue from lands given to the settlements. The Attorney-General told the Legislature on 21 March 1983 that he saw no hope of an immediate settlement. But he emphasized that he:

> would like to see that case tried at an early opportunity given the absence of any negotiations that would likely lead to settlements which is in fact the case. I think it's an important part of my answer that the government side is doing everything possible to see the matter not delayed.[17]

The government provided the Federation of Metis Settlements with $2 million per year for its costs in this lawsuit.

TABLE I EXPENDITURES FOR NATIVE AFFAIRS

YEAR	MINISTERS' OFFICE	ADMINISTRATION	GRANTS	TOTAL
1975-76[1]				1,272,000
1976-77	86,090[2]	535,580	1,351,420	1,887,000
1977-78	93,345[2]	547,000	1,376,962	1,923,962
1978-79	109,740[2]	603,800	1,027,958	1,631,758
1979-80	112,314	655,898	1,028,000	1,796,212
1980-81	126,620	711,901	1,028,000	1,866,521
1981-82	146,215	934,410	2,294,433	3,375,058
1982-83	156,917	1,249,273	2,781,820	4,188,010
1983-84	177,775	1,293,798	2,920,911	4,392,484

[1]No breakdown given for 1975-76.

[2]Funding for the Ministers' Office is not included in the total for these years.

BREAKDOWN OF GRANTS IN ESTIMATES[3]

	1976-77	1977-78	1978-79
Native Friendship Centres	135,420	148,962	200,100
Alta. Native Communications Society	275,000	302,500	—
Alta. Pe-Ta-Pun Dev't Inc.	55,000	—	—
Indian Association of Alberta	168,000	189,000	189,000
Indian Treaty Commemorations	90,000	53,500	—
Isolated Communities Advisory Board	50,000	25,000	—
Metis Association of Alberta	275,000	314,300	335,000
Native Area Dev't Committee	38,000	19,000	—
Voice of Alta. Native Women's Society	45,000	49,500	55,000
Supplementary Funding to Native Org'ns	110,000	154,200	158,858
Isolated Communities	—	—	90,000
Indian News Media	110,000	121,000	—

[3]The breakdown is only available for the years given.

Premier Lougheed emphasized during the discussions on aboriginal rights in March 1983, that all rights given to native people had to be clearly defined. Through implication he resisted the inclusion of any aboriginal rights other than thos included presently under treaty and Metis rights, since that would mean a loss of rights especially to the provinces. Those are not the words of a man who will fight for the rights of the native people. Rather they are the statements of a government that is more interested in protecting its own land, resources and interests.

Although Alberta has established a few of the mechanisms for discussion of native issues and has provided money for services to natives, the actual practices of the government are without direction and are powerless.

Alberta, during the Lougheed era, wil go down in aboriginal history as a province that was more a foe than a friend of the native peoples. No matter how freely the money may have been given to native organizations, there has been no firm commitment to working with the native people to define aboriginal rights. And that is indeed a loss for the native peoples of Alberta as well as other citizens. The Alberta government had taken the lead in watering down aboriginal rights in the Constitution and has also practiced that minimal co-operation in the government programs for natives within Alberta.

FOOTNOTES

[1] Hansard, 3 June 1983, p. 1328.

[2] Douglas Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada" , in Stanley M. Beck and Ivan Bernier, Canada and the New Constitution: The Unfinished Agenda, vol. 1 (The Institute for Research on Public Policy: Montreal, 1983), p. 231.

[3] Hansard, 10 November 1981, p. 1564.

[4] Hansard, 12 November 1981, p. 1587.

[5] Hansard, 12 November 1981, p. 1588.

[6] Hansard, 12 November 1981, p. 1588.

[7] Hansard, 19 November 1981, p. 1717.

[8] Government of Alberta News Release, 20 November 1981, p. 2.

[9] Hansard, 19 April 1982, p. 643.

[10] Hansard, 30 April 1982, p. 883.

[11] Edmonton Journal, 16 March 1983.

[12] Geoff White, Calgary Herald, 18 March 1983.

[13] Toronto Globe and Mail, 16 March 1983, p. 4.

[14] Hansard, 24 February 1977, p. 5.

[15] Rudy Platiel, The Land Claims Series, Toronto Globe and Mail, 7 March 1983.

[16] Hansard, 21 March 1983, p. 168.

[17] Hansard, 21 March 1983, p. 168.

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